Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-996

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEAN MARIE JACOBS, EXECUTRIX OF THE ESTATE OF THOMAS L. JACOBS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

TABLE OF AUTHORITIES

Page

Cases:

Bass v. *Parsons*, 577 F. Supp. 944 4

Buckingham v. *United States*, 394 F.2d 483 3

Buer v. *United States*, 241 F.2d 3, cert. denied, 353 U.S. 974 3

Chaffee v. *United States*, cert. denied, 464 U.S. 915 4

Feres v. *United States*, 340 U.S. 135 ..... 1, 2, 3, 4

Flood v. *Kuhn*, 407 U.S. 258 5

Hall v. *United States*, 451 F.2d 353 3

Hamilton v. *United States*, 564 F. Supp. 1146, aff'd, 719 F.2d 1 3

Harten v. *Coons*, 502 F.2d 1363, cert. denied, 420 U.S. 963 3

Hawe v. *United States*, 670 F.2d 652 4

Henning v. *United States*, 446 F.2d 774, cert. denied, 404 U.S. 1016 3

Henninger v. *United States*, 473 F.2d 814, cert. denied, 414 U.S. 819 3

Howell v. *United States*, 489 F. Supp. 147 4

Jefferson v. *United States*, 340 U.S. 135 ..... 2, 3

Johnson v. *United States*, 631 F.2d 34, cert. denied, 451 U.S. 1018 3

Page

Cases—Continued:

Labash v. *United States Department of the Army*, 668 F.2d 1153, cert. denied, 456 U.S. 1008 3

Lowe v. *United States*, 440 F.2d 452, cert. denied, 404 U.S. 833 3

Norris v. *United States*, 137 F. Supp. 11, aff'd, 229 F.2d 439 3

United States v. *Griggs*, 340 U.S. 135 ..... 2, 3

Veillette v. *United States*, 615 F.2d 505 3

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346 1

28 U.S.C. 2671 *et seq.* 1

28 U.S.C. 2680(h) 4

10 U.S.C. 1089 3

10 U.S.C. 1089(e) 4

Miscellaneous:

H.R. 1942, 98th Cong., 1st Sess. (1983) 4

H.R. 1161, 99th Cong., 1st Sess. (1985) 4

S. Rep. 94-1264, 94th Cong., 2d Sess. (1976) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-996

JEAN MARIE JACOBS, EXECUTRIX OF THE ESTATE OF THOMAS L. JACOBS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, executrix of the estate of a serviceman, seeks damages from the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 and 2671 *et seq.*, on the ground that the death of the serviceman was caused by the negligence of military physicians. Petitioner contends that the court of appeals erred in holding that this action is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), which precludes FTCA suits on behalf of servicemen for alleged torts incident to military service.

1. Petitioner is the widow of Thomas L. Jacobs and the executrix of Jacobs's estate. Jacobs was a major on active duty in the United States Air Force (Pet. App. 7a). In March 1981, Jacobs underwent open-heart surgery at a United States Air Force medical center (*id.* at 9a-10a). The

surgery was performed by Air Force physicians (*id.* at 11a). After surgery and recuperation, Jacobs returned to his normal duties. On December 29, 1981, Jacobs collapsed while jogging and died. Petitioner applied for and now receives Veterans Benefits for the death of Major Jacobs. *Id.* at 11a-12a.

2. Petitioner brought this action under the FTCA in the United States District Court for the District of South Carolina, alleging that Jacobs's death was caused by the negligence of the Air Force physicians who performed the surgery. The district court concluded that petitioner's claim arose out of activity incident to military service and therefore was barred by *Feres*. Pet. App. 5a-23a. The court of appeals affirmed in a brief per curiam opinion (*id.* at 1a-4a). The court held that the case was squarely governed by *Feres*, noting that "the three actions held barred in" *Feres* "includ[ed] two medical malpractice cases" (Pet. App. 3a).

3. The decision of the court of appeals is plainly correct. Petitioner acknowledges that Jacobs was on active duty when he was allegedly injured by a fellow servicemember in a military hospital (*e.g.*, Pet. 2, 7). Petitioner nevertheless contends (*e.g.*, Pet. 9, 16-19) that *Feres* does not bar her claim because Jacobs was not carrying out orders when he was injured and was not injured in a "battle, military exercise or other related military incident" (Pet. 18).

This contention is foreclosed by the *Feres* decision itself. The Court in *Feres* decided three consolidated cases: *Feres* v. *United States, Jefferson* v. *United States,* and *United States* v. *Griggs*. See 340 U.S. at 135 & n.*. As the court of appeals noted, *Jefferson* and *Griggs* both involved FTCA claims on behalf of servicemen who were allegedly subjected to medical malpractice by military surgeons while they were on active duty. *Id.* at 137. This Court held that those claims were barred. Petitioner does not purport to

distinguish, and cannot distinguish, *Jefferson*, *Griggs*, or any of the numerous court of appeals decisions that have uniformly rejected arguments similar to petitioner's and held that "[m]alpractice suits involving medical treatment of active-duty servicemen in military hospitals are barred [by] *Feres*." *Hamilton* v. *United States*, 564 F. Supp. 1146, 1148 (D. Mass.), aff'd, 719 F.2d 1 (1st Cir. 1983). See, *e.g.*, *Hall* v. *United States*, 451 F.2d 353, 354 (1st Cir. 1971); *Norris* v. *United States*, 137 F. Supp. 11, 12 (E.D.N.Y. 1955), aff'd, 229 F.2d 439 (2d Cir. 1956); *Henning* v. *United States*, 446 F.2d 774, 777-778 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972); *Buckingham* v. *United States*, 394 F.2d 483, 484 (4th Cir. 1968); *Lowe* v. *United States*, 440 F.2d 452, 453 (5th Cir.), cert. denied, 404 U.S. 833 (1971); *Johnson* v. *United States*, 631 F.2d 34, 36 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981); *Buer* v. *United States*, 241 F.2d 3, 6 (7th Cir. 1956), cert. denied, 353 U.S. 974 (1957); *Henninger* v. *United States*, 473 F.2d 814, 815 (9th Cir.), cert. denied, 414 U.S. 819 (1973); *Veillette* v. *United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); *Labash* v. *United States Department of Army*, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).[1]

---

[1]Petitioner seems to suggest (Pet. 5, 18) that a different result is called for by the fact that surgery here was elective. But petitioner does not explain why it should make a difference that he underwent only elective surgery. As the courts of appeals have held, any surgery — elective or not — that a serviceman on active duty undergoes at the hands of military doctors is activity incident to military service. See, *e.g.*, *Lowe* v. *United States*, 440 F.2d 452, 453 (5th Cir.), cert. denied, 404 U.S. 833 (1971); *Harten* v. *Coons*, *supra*.

Petitioner also asserts (Pet. 20) that 10 U.S.C. 1089, which renders military physicians and other medical personnel of the armed forces immune from personal liability for malpractice actions, somehow calls into doubt the correctness of *Feres*. That statute, however, simply makes the FTCA the exclusive remedy for medical malpractice claims

Petitioner also contends that the justifications the Court has advanced for the *Feres* doctrine do not warrant its application to medical malpractice claims; in essence, petitioner asks the Court to overrule *Feres* insofar as it applies to such claims. See Pet. 16-17. The Court declined to review a similar contention in *Chaffee* v. *United States,* cert. denied, 464 U.S. 915 (1983), and there is no more reason to reconsider *Feres* now. As we explained in our memorandum in opposition in *Chaffee* (at 3-4),[2] these arguments should be addressed to Congress, not to this Court. In *Feres* itself the Court noted that "if we misinterpret the [FTCA], * * * Congress possesses a ready remedy" (340 U.S. at 138). Congress has recently refused to enact proposed legislation that would have abolished the *Feres* doctrine with respect to claims "aris[ing] out of medical or dental care furnished * * * in a Department of Defense hospital." H.R. 1942, 98th Cong., 1st Sess. 2 (1983).[3] Thus, Congress is well aware that *Feres* bars claims for medical malpractice like those raised by petitioner and has made a decision not to overrule that aspect of the 35-year-old *Feres* doctrine. In these

---

against military personnel; it does not abrogate *Feres*. See S. Rep. 94-1264, 94th Cong., 2d Sess. 4-6 (1976). In fact, 10 U.S.C. 1089(e) provides that the defenses normally available to the government in an FTCA suit by virtue of 28 U.S.C. 2680(h) "shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions"; this shows that Congress knew how to abrogate FTCA defenses in malpractice actions when it wished to do so, and its decision not to abrogate *Feres* — which is not one of the defenses enumerated in 28 U.S.C. 2680(h) — reflects a determination to maintain that defense intact. See also *Hawe* v. *United States*, 670 F.2d 652 (6th Cir. 1982); *Howell* v. *United States,* 489 F. Supp. 147, 150 (W.D. Tenn. 1980); *Bass* v. *Parsons,* 577 F. Supp. 944, 949 (S.D. W. Va. 1984).

[2]We have sent a copy of our memorandum in *Chaffee* to counsel for petitioner.

[3]A similar bill has been introduced in this session of Congress. See H.R. 1161, 99th Cong., 1st Sess. (1985).

circumstances, the Court plainly should not intervene. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEF
Solicitor General

APRIL 1985

DOJ-1985-04